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Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

JERALD D. SAUNDERS,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
To The United States Court of Appeals, Eleventh Circuit

## PETITION FOR WRIT OF CERTIORARI

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## Question Presented for Review

*[In this case the bankruptcy court had granted the debtor's motion for voluntary dismissal of his chapter 7 proceeding upon the debtor's stated intention in his motion that he would file a second case immediately. The court later held that a notice of tax lien recorded by the IRS during the interval between the signature of the dismissal order and the entry of the order on the clerk's docket violated the automatic stay in the first case and was void.]*

Whether the entry of a final order on the bankruptcy court clerk's docket is a condition precedent to the general effectiveness of the final order, and not just for the purpose of setting the time for appeal.

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## Citations of the Official and Unofficial Reports of Opinions and Orders Entered by the Lower Courts

The bankruptcy court opinion is reported at 1996 Bankr. LEXIS 1928 (Bankr. S.D. Fla. 1996).

The district court opinion is published at 240 B.R. 636 (S.D. Fla. 1999).

The bankruptcy court opinion on remand from the district court, addressing an issue not relevant to this petition, is published at 243 B.R. 847 (Bankr. S.D. Fla. 1999).

The circuit court decision is unpublished.

## Statement of Jurisdiction

The decision of the Court of Appeals for the Eleventh Circuit was entered on October 4, 2001, and its mandate issued on November 26, 2001.

This is a petition for writ of certiorari to be granted upon a judgment or decree of a court of appeals, pursuant to 28 U.S.C. §1254(1).

## United States as Party

The United States of America is a party to this petition. The petitioner's counsel has made service of this petition upon Theodore B. Olson, Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, Washington, DC 20530-0001, and Anne R. Schultz, Chief, Appellate Division, U.S. Attorney, 99 N.E. 4th Street, Miami, FL 33132, and Randolph L. Hutter, Appellate Division, Dept. of Justice, P.O. Box 502, Washington, DC 20044.

## Constitutional Provisions, Statutes, and Rules Involved in the Case

*11 U.S.C. §362(a)(4) and (5):*

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of–

* * *

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

*11 U.S.C. §362(c)(2):*

Except as provided in subsections (d), (e), and (f) of this section –

the stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;
(B) the time the case is dismissed; or
(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

*Rule 5003(a), Fed. R. Bankr. P.:*

Bankruptcy Dockets. The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case as prescribed by the Director of the Administrative Office of the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made.

*Rule 9001(7), Fed. R. Bankr. P.:*

The definitions of words and phrases in §101, §902 and §1101 and the rules of construction in §102 of the Code govern their use in these rules. In addition, the following words and phrases used in these rules have the meanings indicated:

* * *

"Judgment" means any appealable order.

*Rule 9002(5), Fed. R. Bankr. P.:*

The following words and phrases used in the Federal Rules of Civil Procedure made applicable to cases under the Code by these rules have the meaning indicated unless they are inconsistent with the context:

* * *

"Judgment" includes any order appealable to an appellate court.

*Rule 9020(c), Fed. R. Bankr. P.:*

Service and Effective Date of Order; Review. The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

*Rule 9021, Fed. R. Bankr. P.:*

Except as otherwise provided herein, Rule 58 F.R. Civ. P. applies in cases under the Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F. R. Civ. P. to Rule 79(a) F.R. Civ. P. shall be read as a reference to Rule 5003 of these rules.

*Rule 58, Fed. R. Civ. P.:*

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A

judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

*Rule 79(a), Fed. R. Civ. P.:*

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, order, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issues and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered, the clerk shall enter the word "jury" on the folio assigned to that action.

*General Orders in Bankruptcy, No. I (promulgated by the Supreme Court, November 28, 1898):*

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

*General Orders in Bankruptcy, No. II (promulgated by the Supreme Court, November 28, 1898):*

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

## Statement of the Case

The petitioner, Jerald D. Saunders ("Mr. Saunders"), was the debtor and plaintiff in an adversary proceeding commenced in his chapter 7 bankruptcy case. In the adversary proceeding he sought a finding of the dischargeability of certain federal income tax obligations and an adjudication of the validity of two liens filed by the Internal Revenue Service. The trial judge, United States Bankruptcy Judge Raymond B. Ray, entered a judgment in favor of Mr. Saunders as to certain tax years, and against him as to certain other tax years. The bankruptcy court also voided both liens. The judgment is reproduced in the *Appendix*, pp. 1-16.

From that Memorandum Decision and Order both sides appealed in 1996.

On February 25, 1999, United States District Judge William Dimitrouleas affirmed the bankruptcy court's determination of which taxes were discharged, and affirmed the avoidance of the earlier of the two tax liens, but reversed as to the second lien and remanded for further clarification by the bankruptcy court on a minor issue not relevant to this petition. The district court decision is published at 240 B.R. 636 (S.D. Fla. 1999), and reproduced in the *Appendix*, pp 17-35. The reversal has the effect of returning the Internal Revenue Service to a fully secured position on both discharged and nondischarged taxes, because Mr. Saunders owns an individual retirement account--rolled over from a Pan American Airways 401K plan—which is not immune from levy by the IRS.

On remand, the bankruptcy court rendered two supplemental decisions which entered judgment in accordance with the mandate and made other findings not

relevant to this petition. Upon the parties' stipulation that the matter was ripe for adjudication in the district court, the district court entered a final appealable order, from which an appeal was taken to the court of appeals.

Mr. Saunders did *not* appeal that portion of Judge Dimitrouleas' order finding that 1984, 1985, and 1986 taxes are nondischargeable. And the United States did *not* appeal that portion of Judge Dimitrouleas' order finding that the earlier of the two tax liens was properly avoided by the bankruptcy court. Consequently, the 1978, 1979 and 1987 taxes, totaling roughly $214,000 in 1994, are discharged, and the 1983, 1984, 1985, and 1986 taxes, totaling roughly $298,000 in 1994, are not discharged. But all of the taxes are fully secured by the second tax lien, against Mr. Saunders' IRA. The only subject before the court of appeals was the validity of the second tax lien, and the only issue was whether the dismissal order had yet taken effect when the tax lien was recorded before the order was docketed.

The court of appeals affirmed, without opinion, on October 4, 2001. The judgment is reproduced in the *Appendix*, pp. 36-37.

The basis for federal jurisdiction in the court of first instance—the bankruptcy court—is 28 U.S.C. §1334 and 28 U.S.C. §157(b)(1), and the district court's general order of reference made under 28 U.S.C. §157(a). The contested matter (motion to dismiss the first bankruptcy case) and the adversary proceeding (seeking to invalidate the tax lien) were both "core matters" within the meaning of 28 U.S.C. §157(b)(2)(A) and (K).

## Argument

This case presents a single issue of law, and no disputed issues of fact.

The decision of the court of appeals is squarely in conflict with the only other circuit court decisions on point, those by the Second and Fifth Circuit Courts of Appeals

Although the decision of the court of appeals is unpublished, it is a *per curiam* affirmance of a published decision of the district court, 240 B.R. 636 (S.D. Fla. 1999).

The issue— whether the Supreme Court intended the plain meaning of the word "effective" in its rule on judgments and final orders— is one of great importance, because the plain meaning of Rule 9021 is consonant with a principle of fairness inherent in the rules— that judgments and other final orders are not effective until the public has access to them.

It is the petitioner's contention that *final orders* become effective— as the rule states— when docketed by the clerk. It is the *government's* contention that the effectiveness of final orders, except for the purpose of determining the deadline to file a motion for reconsideration or a notice of appeal, is no different than the effectiveness of nonfinal orders— that they become effective either upon pronouncement, or upon being reduced to writing, or possibly upon being delivered to the clerk.

## Facts

The Internal Revenue Service served a Notice of Levy, directed to Mr. Saunders' individual retirement accounts, upon the stock brokerage firm Smith Barney Shearson in 1994, seeking to apply the funds in Mr. Saunders' IRA's to the payment of his tax obligations. At

the time, the 1978, 1979, and 1987 taxes were already dischargeable in the event Mr. Saunders filed bankruptcy. On the date that Smith Barney was to release the funds, Mr. Saunders filed a chapter 7 petition for relief in the bankruptcy court. Upon the filing of the petition, 11 U.S.C. §362(a) had the effect of automatically staying the levy, and the automatic stay would remain in effect until the case was dismissed. 11 U.S.C. §362(c)(2).

On August 26, 1994, Mr. Saunders filed a Motion for Dismissal, explaining in the motion that additional taxes had become dischargeable since his original petition date and that he wished to dismiss and refile his case. Over the objection of the United States, the bankruptcy court at a hearing on September 8, 1994 announced that he would permit the dismissal.[1] Immediately following Judge Ray's pronouncement at the hearing that he would agree to the dismissal, and without knowing whether a dismissal order had actually been signed by the judge, the IRS recorded a Notice of Tax Lien in the Public Records of Broward County, Florida, at 2:32 p.m. on September 8, 1994.

If the recording were valid, it would cause the IRS to become secured, as to both dischargeable and nondischargeable taxes, interest, and penalties, against Mr. Saunders' individual retirement account.

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[1] Ultimately, the bankruptcy court would adopt the majority rule, that a debtor may not improve his position as to dischargeability by dismissing and refiling his case, so Mr. Saunders does not receive the benefit of the refiling. Consequently, all taxes which were nondischargeable in Mr. Saunders' first bankruptcy case—filed to stay the levy upon Smith Barney—are nondischargeable in this case as well. Judge Dimitrouleas affirmed that finding, and Mr. Saunders did not further appeal from it.

It was later discovered that this perfection of the tax lien took place after Judge Ray had signed the order and delivered it to the clerk, but before the order was entered on the docket (4:09 p.m.). The next morning at 10:53 a.m., Mr. Saunders filed his second chapter 7 petition. It is in this second case that Judge Ray held that the September 8, 1994 tax lien was avoidable, because the Notice of Lien was recorded before the *docketing* of the dismissal order in the first case, citing Bankruptcy Rule 9021. According to the bankruptcy court, because the automatic stay was still in effect in the first case, the prematurely recorded lien was not valid. The district court reversed on this point, and the court of appeals affirmed the district court.

## Legal Argument

Because actions taken in violation of the automatic stay are invalid, Easley v. Pettibone Michigan Corp., 990 F. 2d 905 (6th Cir. 1993), In re Schwartz, 954 F. 2d 569 (9th Cir. 1992), there is no doubt in this case that the tax lien would be invalid if it were recorded before the dismissal of the first chapter 7 case took effect. 11 U.S.C. §362(c)(2) (automatic stay expires only upon earlier of case closing, dismissal, or discharge). The only issue is when the dismissal took effect.

Dismissals of bankruptcy cases take effect only when the dismissal order is entered on the court docket. Fed. R. Bankr. P. 9021. That rule provides:

> Except as otherwise provided herein, Rule 58, F.R. Civ. P. applies in cases under the [Bankruptcy] Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F.R. Civ. P. to Rule 79(a) F.R. Civ. P. shall be read as a reference to Rule 5003 of these rules.

The parties agree that the dismissal order is a "judgment"[2] entered in a "contested matter."[3] The disagreement between the parties is over whether "effective," in Rule 9021, means "effective for the purpose of setting the time for filing a motion for reconsideration or appeal."

Rule 9021 is based closely on Rule 58, Federal Rules of Civil Procedure. It specifically incorporates Rule 58 by reference, and makes only two emendations: (1) it limits the "separate document" provision to judgments in adversary proceedings and contested matters, and (2) it restates so much of Rule 58 as is necessary to refer the reader to the bankruptcy court docketing procedure in Bankruptcy Rule 5003 rather than the district court docketing procedure in Civil Rule 79(a).

Federal Rule 58, in relevant part, states:

> [U]pon a decision by the court granting other relief...the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).

The docketing rules themselves, Bankruptcy Rule 5003 and Civil Rule 79(a), are also nearly identical to each other, providing in relevant part that the clerk shall keep a docket in each case and shall enter on it each judgment. The Advisory Committee Notes to the original enactment of Rule 5003 notes: "Subdivisions (a), (c), (d), and (e) are similar to subdivisions (a)-(d) of Rule 79, F.R. Civ. P."

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[2] "Judgment" means any appealable order. Fed. R. Bankr. P. 9001(7). See also, Fed. R. Bankr. P. 9002(5).

[3] Fed. R. Bankr. P. 9014.

The filing and docketing procedure have separate purposes, and separate procedures. The first two rules adopted under the Bankruptcy Act of 1898, addressed filing and docketing. They provided for the clerk to maintain a docket and to note on it "a memorandum of all proceedings in the case" and mandated that the docket "shall at all times be open to public inspection"; and that the clerk was to endorse onto each paper the day and hour of its filing. General Orders I, II (1898). Under the General Orders, judgments of the bankruptcy court were not effective before entry on the docket. Rosenberg v. Heffron, 131 F. 2d 80 (9th Cir. 1942).

The United States contended, and the district court agreed, that the use of the word "effective" was limited to starting the clock for motions for rehearing and for notices of appeal. It is true that the great majority of cases which cite to Rule 9021 or to Civil Rule 58 involve a determination of either the timeliness of an appeal or the ripeness for appeal; in the context of determining timeliness of appeal, the issue of "rendition versus clerk's entry" in federal courts dates back at least to Seymour v. Freer, 72 U.S. 822, 18 L. Ed. 564 (1866) (holding that an appeal bond filed within ten days after the clerk's entry but more than ten days after the judge's rendition was timely). However, the timeliness of an appeal is not the issue here. The issue is whether the Supreme Court, in choosing the word "effective," intended a narrower meaning than the plain meaning.

This Court, in holding that the phrase "excusable neglect" in a bankruptcy rule must be read according to its plain meaning, has stated that "[c]ourts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' Pioneer Investment Services, Inc. v. Brunswick Associates, Ltd., 507 U.S. 380, 389, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993) , citing Perrin v. United States, 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311

(1979); see also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989) (applying "plain meaning" principles to language of Bankruptcy Code).

Reported cases involving the validity of an act which occurred between the rendition and the docketing of an order are relatively uncommon, but courts have specifically addressed the issue of whether the dismissal of a bankruptcy case is effective upon rendition for purposes other than starting the appellate clock. *Except for the decision of the district court in the present case, every published decision by a district court or a court of appeals supports the petitioner's view that the plain meaning of "effective" determines that a final order is not operative and has no effect prior to its docketing.*

The Court of Appeals for the Fifth Circuit addressed the scope of "effectiveness" in In re American Precision Vibrator Company, 863 F. 2d 428 (5th Cir. 1989). In that case, a bankruptcy judge had rendered an order granting a motion to dismiss a chapter 11 case, apparently based on the clerk's failure to note a pending opposition to the motion, and the same judge rendered another order two weeks later denying the same motion to dismiss. Only after the second order was rendered were the two orders docketed pursuant to Rule 5003, with the second order docketed first. A successor judge declined to clarify which order was correct, and on appeal the district court vacated the second order on the basis that the rendering of the first order—dismissing the case—deprived the bankruptcy court of further jurisdiction. The Fifth Circuit reversed, holding that the dismissal order was not effective because the dismissal order had not yet been entered on the clerk's docket when the subsequent order was so docketed. Id. at 429.

Similarly, in Coones v. Mutual Life Insurance Company of New York, 168 B.R. 247 (D. Wyo. 1994), District Judge Alan B. Johnson considered whether a dismissal order

could have any effect before it was docketed. In that case, the bankruptcy court had pronounced the dismissal of a chapter 11 proceeding at a hearing on March 14, 1990, and heard an undersecured creditor's motion to modify the automatic stay the next day. The order from the second hearing, modifying the stay to permit completion of a foreclosure, was actually entered before the dismissal order. Pursuant to an option in the dismissal order, the debtors converted their cases to chapter 7 proceedings, and continued to oppose the creditor's foreclosure. The debtors argued on appeal that the dismissal order was effective when pronounced, depriving the bankruptcy court of the authority to hear and grant the stay relief motion the next day. In holding that the dismissal order had no effect when the stay relief order was granted, and affirming the bankruptcy court, the district court stated:

> Fed. R. Bankr. P. 9021 provides, in relevant part, that
>
> "[a] judgment is effective when entered as provided in Rule 5003." Thus, a bankruptcy judgment does not take effect when it is "rendered," but only when it is "entered" by the clerk of the bankruptcy court in the manner provided for in Rule 5003.

Id at 258.

In In re Barbieri, 199 F. 3d 616 (2nd Cir. 1999), at a hearing on a chapter 13 debtor's motion to sell property, the bankruptcy court announced that he was *sua sponte* converting the debtor's case to a chapter 7 proceeding. The debtor's counsel immediately sought to dismiss the case. The bankruptcy court denied the request, stating "I will enter an order today converting this case to chapter 7." Id. at 622. The district court affirmed the conversion order. Noting that voluntary dismissal of a chapter 13 case is a matter of right, the Court of Appeals for the Second Circuit

held that the announced order of conversion was ineffective to prevent the debtor from dismissing her case:

> [T]he court did not order the conversion until after the debtor's counsel had requested to withdraw the petition. Moreover, Federal Rule of Bankruptcy Procedure 9021(a) specifies, in relevant part, that "[a] judgment is effective when entered as provided in Rule 5003." In turn, Rule 5003(a) provides, in relevant part, that "the clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case." In this case, the Bankruptcy Court's order had not been entered on the Clerk's docket pursuant to Rule 4003 at the time Barbieri moved to dismiss. Accordingly, the conversion had not become effective before Barbieri's request for voluntary dismissal was made.

In re Barbieri, at 622. Accord, Beatty v. Traub, 162 B.R. 853 (9th Cir. BAP 1994).

The effective-upon-docketing rule has also been cited for the converse position, that once the dismissal order *has been* entered on the docket, the court loses jurisdiction to determine other motions. In re Petty, 848 F. 2d 654, 655 (5th Cir. 1988) (holding that, where an order denying a landlord's motion to compel a debtor's surrender of property was signed June 16 and entered by the clerk on July 16, but a dismissal order was entered by clerk on July 2, the dismissal is effective to deprive the court of jurisdiction to enter an order on a surrender motion).

In the present case, the district court cited no authority whatsoever for its ruling, but offered the observation that in his experience the docketing of orders is sometimes delayed and expressed a concern that litigants would ignore his rulings until they were docketed by the clerk. The court of appeals apparently agreed. However,

the plain meaning of "effective" in Rule 9021 should not generate any such concern. First, Rule 9021 applies by its terms to "judgments" only, a phrase which encompasses dismissal orders, conversion orders, and other appealable orders, Fed. R. Bankr. P. 9001(7), 9002(5), but not interlocutory orders. Rule 9021 (and its counterpart, Federal Rule 58) give no comfort to a party who would disregard an injunction, a discovery order, or any other interlocutory order. Interlocutory orders are effective upon oral pronouncement or written rendition.

Second, in the rare instance where a judge intends , for a particular reason, that a judgment be effective even before it is docketed, the judge can so direct. In scores of published decisions, federal courts have directed, even after docketing, that particular orders be treated as having been entered *nunc pro tunc* for the very purpose of assuring that the effectiveness was not delayed. See, cases cited at Moore's Federal Procedure, ¶58.08. The bankruptcy judge here did not intend *nunc pro tunc* dismissal, as is clear from his later ruling that even the filing of his dismissal order with the court clerk did not make it effective before docketing.

Although Bankruptcy Rule 9021 derives from the earlier general orders entered by the Supreme Court in conjunction with the 1898 bankruptcy statute, the historical antecedents of the "effective upon docketing" rule should be examined. This Court once considered this issue, not in the context of Bankruptcy Rule 9021 or Civil Rule 58, but rather in the context of a state court rule. In Anglo-Californian Bank v. Mahoney Mining Co., 1 Fed. Cases 392 (D. Cal. 1878), a judgment which, among other things, ousted the board of directors of a corporation, had been prepared and dated by the judge, but neither filed nor entered on the clerk's docket, at the time the board undertook a further corporate action. The district judge held that the corporate action was valid despite the rendition of the judgment, and

the Supreme Court affirmed, noting particularly that the rendition of the judgment was of no effect until it was filed by the clerk. Anglo-Californian Bank v. Mahoney Mining Co., 104 U.S. 192, 26 L. Ed. 707 (1881).

Furthermore, the Supreme Court has approved at least one other bankruptcy rule, Rule 9020, which uses the term "effective" in relation to a type of order. A comparison of the two consecutive rules (Bankruptcy Rules 9020 and 9021) shows that the word "effective" means to have force or effect, which is consistent with ordinary dictionary definitions of the word. Rule 9020 provides that a contempt order entered by a bankruptcy judge "shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court, unless, within the 10 day period, the entity named therein serves and files objections...." There is no reason, under the principle of *ejusdem generis*, to give a different meaning to the same word in consecutive rules.

In summary, the rulings of the district court and the court of appeals in this case have permitted the Internal Revenue Service to elevate its position from unsecured creditor to a creditor secured by a lien on the petitioner's IRA accounts without first awaiting the entry of the dismissal order on the clerk's docket. To avoid a race by litigants speculating on when an order would be signed, or filed, or docketed, this Court established docketing as the most appropriate time for a final order to take effect. All other published federal court decisions on the issue, of actions taken prior to docketing, have held that final orders are ineffective before docketing. There is no reason to believe that this Court intended any more limited meaning for the word "effective," and there is substantial basis for believing that the Court intended its plain meaning.

Wherefore, the petitioner seeks a writ of certiorari to review the judgment of the court of appeals, this 2nd day of January, 2002.

Supreme Court, U.S.
FILED

011051 JAN 2 2002

OFFICE OF THE CLERK

No. _____

In The

# Supreme Court of the United States

JERALD D. SAUNDERS,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
To The United States Court of Appeals, Eleventh Circuit

## APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

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*[1996 Bankr. LEXIS 1928 ]*

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

JERALD SAUNDERS, Debtor.

CASE NO. 94-23489-BKC-RBR
_____/

JERALD SAUNDERS, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

ADVERSARY NO. 95-0475-BKC-RBR-A
_____/

**MEMORANDUM DECISION AND ORDER**

THIS MATTER came before the Court for trial on September 22, 1995 upon the Debtor's Complaint to Avoid Liens and Determine Dischargeability of Income Taxes. The Court, having heard the testimony, examined the evidence presented, observed the candor and demeanor of the witnesses, and considered the arguments of counsel, makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

The Debtor, Jerald Saunders, first filed for bankruptcy relief under Chapter 7 of the Bankruptcy Code on July 6, 1994. As discussed later herein, that case was eventually

dismissed at the request of the Debtor, and the Debtor's second Chapter 7 petition was filed on September 9, 1994. At the time of the Debtor's first petition, the Debtor owed the IRS over $ 500,000.00 in delinquent federal income taxes, interest, and penalties for [*2] the years 1978, 1979, 1983, 1984, 1985, 1986, and 1987. These delinquencies are the subject of this adversary proceeding.

The Debtor was a long-term pilot for Pan American Airways ("Pan Am") who lost his job after Pan Am filed for bankruptcy relief in late 1991. As an employee of Pan Am, the Debtor had an interest in two ERISA Title I qualified pension plans. During the course of Pan Am's bankruptcy proceedings, the Debtor's interests in those pension plans were terminated. Consequently, in March 1993, the Debtor rolled over his funds from the pension plans into individual retirement accounts (IRA) held at Smith Barney Shearson, Inc. ("Smith Barney"). The Debtor has claimed an exemption in these funds on his Schedule C, and no objection has been filed to the exemption. Therefore, the funds in the Debtor's IRA accounts are generally exempt from the claims of the trustee and general creditors.

The IRS recorded two Notices of Federal Tax Lien with respect to the Debtor's tax delinquencies. The first one was filed in Washington, D.C. on September 20, 1991. The other one was recorded in the public records of Broward County, Florida on September 8, 1994, in connection with the dismissal [*3] of the original Chapter 7 and the refiling of the second Chapter 7. Curiously, no notices were recorded in the time period between 1992 and September 1994.

The IRS mailed a Notice of Levy to Smith Barney on June 9 or 10, 1994. Smith Barney received the notice on June 14, 1994. At all times before the levy, Smith Barney held

more funds in the Debtor's IRA accounts than the sum stated in the Notice of Levy. The notice instructed Smith Barney to hold the funds for 21 days from the date of receipt of the notice, and the funds were be released to the IRS on July 6, 1994. However, the Debtor's bankruptcy petition was filed on July 6, 1994 and the automatic stay prohibited Smith Barney from releasing the funds.

In his Complaint, the Debtor seeks a determination that his entire obligation to the IRS is dischargeable except for the taxes, interest and penalties for the 1986 tax year. The IRS does not dispute that the obligations for the years 1978, 1979, and 1987 are dischargeable. However, the IRS maintains that the Debtor may not discharge the debt owed for 1983, 1984, and 1985.

The Debtor also seeks the determination that the notices of federal tax lien filed by the IRS were ineffective. [*4] As stated above, the first notice of federal tax lien was filed on September 20, 1991 in Washington, D.C. The Debtor claims that he was a resident of Florida at that time and, therefore, the filing in Washington, D.C. was not proper.

In support of its contention that Washington, D.C. was the proper jurisdiction for filing the notice, the IRS maintains that the documents used by the IRS to locate the Debtor indicated that the Debtor was residing outside of the country. It also argues that even if the Debtor was living in Florida in September of 1991, the Debtor never provided the IRS with a change of address.

The Debtor testified that he was based in Berlin, Germany for a period of time but was transferred by Pan Am to Miami, Florida in early 1991, and that he generally resided at the same address in Ft. Lauderdale, Florida from the date of the Pan Am transfer to the date of the

trial.

At trial, Cyd Sykes, an IRS Revenue Officer testified as to the IRS source documents used by the IRS to determine the Debtor's last known address. She testified that the documents listed an international address, an address in Jamaica, New York, an address in Kent, Connecticut, and one document listed [*5] the Debtor's current address in Fort Lauderdale, Florida.

Upon review of the evidence, I find that the Debtor has been a resident of Florida since he was reassigned to Miami by Pan Am in April 1991. At that time, he was registered in a training course and filed a W-4 with his employer listing his Florida address. The Debtor has spent a great majority of his time traveling with Pan Am and "living out of a suitcase," but in 1991 the Debtor spent more than 100 days in Florida. He registered to vote in Florida before the 1992 general election, and in early 1993 he filed his 1989, 1990, and 1991 tax returns using the Florida address. The IRS has not produced any evidence that the Debtor claimed any residency other than Florida after April 1991, or that Mr. Saunders spent more time anywhere other than Florida.

I also find that several grounds existed for the IRS to question the Debtor's actual address in September 1991, but neglected to do so. While the IRS was aware that the Debtor was assigned to employment overseas since the late 1980's, several source documents on file with the IRS contained domestic addresses. In addition, when the IRS garnished the Debtor's wages beginning September [*6] 15, 1991, the IRS initially used a German Pan Am address but was unsuccessful. Thereafter, the IRS re-noticed the levy to Pan Am-New York. Considering these factors, the IRS should have questioned whether the Debtor still resided overseas.

It was conceded that the Debtor's first Chapter 7 petition was filed for the purpose of preventing the IRS from successfully levying upon the Debtor's IRA accounts. However, after that petition was filed the Debtor determined that the filing on July 6, 1994 would not allow the Debtor to discharge in the Bankruptcy all of the past due taxes pursuant to 11 U.S.C. §§ 507(a)(8)(A)(ii) and 523(a)(1)(A). Therefore, on August 26, 1994, the Debtor sought to dismiss the first bankruptcy and immediately thereafter file a second bankruptcy which would enable the Debtor to discharge virtually all of the past due taxes. This matter was noticed for hearing on September 8, 1995. It was as a result of the Debtor's actions and the dismissal of the first bankruptcy petition that the second notice of levy to which the Debtor objects was filed in Broward County, Florida on September 8, 1994. The Court's ruling authorizing dismissal of the case was read into the record [*7] at the time of the hearing, or approximately 10-11:00 a.m. The written Order (the "Dismissal Order") was date-stamped by the Clerk's office at 2:01 p.m. and docketed at 4:09 p.m. that same day.

Immediately following the hearing on the Debtor's Motion to Dismiss, IRS counsel instructed a waiting IRS Revenue Officer to file a notice of federal tax lien in Broward County, Florida. The notice was date-stamped at 2:32 p.m. on September 8, 1994 at the Broward County State Courthouse. The Debtor maintains that since the notice was filed prior to the actual docketing of the Dismissal Order, the notice was filed in violation of the automatic stay and is thereby ineffective.

The Court will address each of the above issues in turn below.

## CONCLUSIONS OF LAW

### The Notice of Federal Tax Lien Filed on September 8, 1994 Violated the Automatic Stay Provisions of § 362

Federal Rule of Bankruptcy Procedure 9021 provides that "[a] judgment is effective when entered as provided in Rule 5003." Rule 5003 requires the Clerk to enter on the official docket "each judgment, order, and activity in that case." The term "judgment" as used in this rule means "any appealable order". F.R.B.P. 9001(7). [*8] Therefore, any appealable order becomes effective once entered on the Court's official docket.

The Dismissal Order is an appealable final order. Consequently, following the plain meaning of the above rules, the notice of federal tax lien, which was filed prior to the actual docketing of the Dismissal Orders, was filed when the automatic stay was still in effect. See, In re Weston, 101 B.R. 202 (Bankr. E.D. Ca. 1989) (automatic stay terminated when dismissal order entered on docket), aff'd, 123 B.R. 466 (9th Cir. BAP 1991). See also, In re Beatty, 162 B.R. 853 (9th Cir. BAP 1994) (effective and operative date of order is date of entry into docket); In re Rebeor, 89 B.R. 314 (Bankr. N.D.N.Y. 1988) (oral ruling converting case was not effective until entered on docket by clerk).

The United States argues that such a result would be unjust as bankruptcy practitioners often rush copies of date-stamped petitions to the IRS to stop collection activities. The government argues that the Debtor cannot rely on the act of filing to commence the automatic stay, but thereafter rely on the act of entry on the docket to lift the same stay. The IRS maintains that if the Debtor's argument [*9] is accepted, "the IRS reasonably could contend that it need not stop collection activity until receiving a copy of a docket entry sheet showing the

filing time and date of a bankruptcy petition or order. . . ."

The government's position is incorrect. Rule 9021 only applies to judgments and final orders, not to petitions. Section 301 of the Code specifically provides that a voluntary petition is effective upon filing. Similarly, Section 362(a) provides that the filing of a petition operates as an automatic stay. The IRS may find this disparate treatment unfair, but such treatment is mandated by the Code.

The United States also refers the Court to a recent decision by the Bankruptcy Court for the District of Massachusetts, Eastern Division, for the proposition that formal entry on the docket of an oral ruling is insignificant. Roy v. Roy, et. al., Case No. 93-1040 (October 2, 1995). In Roy, the Court affirmed monetary sanctions against an attorney for failing to disclose an oral order of dismissal in a related case. The Court found that the attorney should have disclosed the prior oral rulings, and the fact that a "final order had not been entered on the docket did [*10] not obviate [the attorney's] obligation to ensure that full disclosure was made." Roy, Case No. 93-1040, slip. op. at 4. However, while the Court found that the attorney should have disclosed the existence of the oral ruling, the Court did not address the effectiveness of the order prior to it being docketed. I also find this case factually distinguishable as the issue in Roy was the appropriateness of Rule 11 sanctions for an attorney who filed a motion in the Massachusetts bankruptcy court requesting sanctions for violation of the automatic stay without disclosing that the bankruptcy court in California had orally dismissed her client's case and denied her employment. The undisclosed facts were critical to the outcome of the attorney's motion. In contrast, sanctions pursuant to Rule 9011 are not at issue in this case, and there has been no

allegation that any of the parties herein misled the Court.

**The Notice of Federal Tax Lien filed in Washington D.C. on September 20, 1991 was Ineffective**

Pursuant to 26 U.S.C. § 6323(f)(2)(B) the proper location for filing a notice of federal tax lien for personal property is the residence of the taxpayer at the time the notice [*11] is filed. By statute, "the residence of a taxpayer whose residence is without the United States is deemed to be in the District of Columbia." § 6323(f)(2). Consequently, the 1991 lien notice filed in Washington, D.C. is valid against a hypothetical bona fide creditor and the Debtor only if the Debtor was a resident of Washington, D.C. or a resident "without the United States" at the time the lien was filed.

As stated above, the IRS maintains that the filing in Washington, D.C. was proper based on its knowledge of the Debtor's whereabouts. The government contends that as of September 20, 1991, the information possessed by the IRS indicated that the Debtor was living abroad. As such, the IRS maintains that it cannot be expected to know the undisclosed location of a Debtor who has moved without advising them, and refers the Court to several cases to support the proposition that the taxpayer's "last known address" is controlling.

I have reviewed the cases cited by the IRS and I find them distinguishable from the matter presently before the Court. Each of the cited cases involves the determination of a taxpayer's address for the purpose of mailing a notice of tax deficiency. The deficiency [*12] notice statute, 26 U.S.C. § 6212, specifically provides that the "last known address" is the address to be used for such purposes. In contrast, the lien notice statute at issue in this case does not provide that a taxpayer's "last known address" is to be used for the filing of a notice of

federal tax lien. In fact, it has been held that § 6323(f) does not generally permit the IRS to file its notice at the place of the taxpayer's "last known address," even if IRS does not know the taxpayer's current address. For instance, in Corwin Consultants, Inc. v. Interpublic Group of Companies, Inc., 512 F.2d 605 (2d Cir. 1975), the Second Circuit stated

> A principal purpose of the 1966 Tax Lien Act in using residence filing was to "increase the likelihood that creditors, generally, will receive notice as to the taxpayer's standing with the Government."

Id. at 610. As such, the Court recognized that "a last known address interpretation [of § 6323] might thus put creditors of the taxpayer at the mercy of whatever records the IRS office involved happens to possess," and acknowledged that it may even be impossible under the law for the IRS to properly perfect its [*13] lien in certain cases, such as where the taxpayer has no definable address. Id.

Furthermore, even if the Court assumes that the taxpayer's "last known address" is controlling, when the IRS holds information which indicates that the address on the taxpayer's last filed tax return may be incorrect, it is under a duty to exercise "reasonable diligence" to ascertain the correct address. In re Bell, 166 B.R. 478, 480 (Bankr. S.D. Fla. 1994), aff'd, 183 B.R. 650 (S.D. Fla. 1995). According to the testimony of Ms. Sykes, the source documents used by the IRS to determine the Debtor's whereabouts contained numerous addresses, both within the United States and abroad. Considering these numerous addresses, I find that the IRS had an obligation to attempt to ascertain which address, if any,

was correct. This obligation could have been satisfied by simply sending an address information request form to the addresses listed on the source documents, to the Debtor's employer, or to the Debtor's accountant. However, since the IRS did not make any such inquiries, I find that the IRS did not exercise reasonable diligence when it filed the notice in Washington, D.C.

Finally, I note that between [*14] September 20, 1991 and June 8, 1994, the date of the Debtor's second petition, the Debtor filed several tax documents with the IRS which listed the Debtor's Ft. Lauderdale address. For example, when the Debtor changed his address to Ft. Lauderdale, Florida in early 1991, he gave Pan Am a W-4. Although the IRS may not have received a copy of this W-4, they did receive a copy of the W-2 which was generated by Pan Am in 1992 for the 1991 tax year. In addition, the Debtor's tax returns for 1989, 1990 and 1991, each listing the Florida address, were filed in early 1993. At that time, the IRS could have easily protected its claim by filing a notice in Florida, yet it waited until June of 1994 to do so. The IRS has provided no reasonable explanation for its delinquent actions.

Accordingly, for all of the reasons stated above, I find that the filing of the notice in Washington, D.C. was invalid.

**The Debtor is Entitled to Discharge the Assessed and Unpaid Federal Income Tax Liabilities for Years 1978, 1979, and 1987**

Sections 507(a)(8)(A)(ii) and 523(a)(1)(A) of the Bankruptcy Code provide that prepetition indebtedness for income taxes is non-dischargeable if the taxes were "assessed [*15] within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such

assessment was pending, before the date of the filing of the petition." § 507(a)(8)(A)(ii).

The Debtor had an offer in compromise pending for 476 days. Therefore, to determine whether the Debtor's unpaid tax liability for a given year is dischargeable, the Court must count the number of days between the date of assessment and the date of the Debtor's first petition, July 6, 1994, and subtract 506 days (476 plus 30). The tax year is dischargeable if the result for any given year is greater than 240.

The calculations for the years at issue are as follows:

| Year | # of Days | | | |
|---|---|---|---|---|
| 1978 | 2,609 - 506 | = | 2,103 | Dischargeable |
| 1979 | 2,609 - 506 | = | 2,103 | Dischargeable |
| 1983 | 714 - 506 | = | 158 | Non-Dischargeable |
| 1984 | 738 - 506 | = | 232 | Non-Dischargeable |
| 1985 | 692 - 506 | = | 186 | Non-Dischargeable |
| 1986 | 500 - 506 | = | -6 | Non-Dischargeable |
| 1987 | 771 - 506 | = | 265 | Dischargeable |

The Debtor argues that the above calculations are incorrect. He asserts that the automatic stay in the Debtor's first bankruptcy did not toll the running of the [*16] limitations period for the delinquent taxes. Therefore, the Debtor argues that the calculation must be conducted from the date of the Debtor's second petition, September 9, 1994. In that case, only the delinquent taxes for 1986 would be non-dischargeable.

The relevant code sections are 11 U.S.C. § 108(c)[1] and 26 U.S.C. 6503(h).[2] Several courts have held that these provisions operate to extend the limitations periods provided in §§ 507(a)(8)(A)(ii) and 523(a) during the pendency of a debtor's bankruptcy case. In re Teeslink, 165 B.R. 708, 711 (Bankr. S.D. Ga. 1994). See also, In re Montoya, 965 F.2d 554 (7th Cir. 1992); In re Richards, 141 B.R. 751 (W.D. Okl. 1992), aff'd, 994 F.2d 763 (10th Cir. 1993); In re West, 137 B.R. 1012 (D. Or. 1992), aff'd, 5 F.3d 423 (9th Cir. 1993). However, the

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[1] Section § 108(c) provides:

> If applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of . . . the end of such period, including an suspension of such period occurring on or after the commencement of the case. (emphasis added).

[2] Section 6503(h) provides:

> **Cases under title 11 of the United States Code.**
> The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and -
>
> (1) for assessment, 60 days thereafter, and
> (2) for collection, 6 months thereafter.

plain language of the statute suggests that § 108(c) only applies to nonbankruptcy law. Therefore, since the time periods provided in §§ 507 and 523 are necessarily bankruptcy law, § 108(c) would not apply. [*17]

This plain language interpretation of § 108(c) was adopted by Judge Cohen in the Northern District of Alabama. In re Gore, 182 B.R. 293 (Bankr. N.D. Ala. 1995); In re Turner, 182 B.R. 317 (Bankr. N.D. Ala. 1995). In Gore and Turner, Judge Cohen recognized that

> Neither section 108(c) of the Bankruptcy Code nor section 6503(h) of the Internal Revenue Code mention the word "discharge," or refer to section 523 or section 507, or by their express terms purport to relate to or effect either the dischargeability or priority of taxes in bankruptcy, but instead, specifically apply to [*18] nonbankruptcy periods of limitation.

Gore, 182 B.R. at 299; Turner, 182 B.R. at 324. He also reasoned that had Congress intended the time period in §§ 507 and 523 to be suspended during the pendency of prior bankruptcy cases, Congress could have easily enacted such a provision in the Bankruptcy Code just as it had with respect to offers in compromise. 182 B.R. 293 at 302.

While Judge Cohen determined that §§ 108(c) and 6503(h) do not toll the time periods specified in §§ 507 and 523, he explained that under 11 U.S.C. § 105, the bankruptcy court may nevertheless exercise its equitable powers when it would be necessary to prevent prejudice to the IRS. As such, if the discharge of the debtor's

income taxes in a subsequently filed bankruptcy case would be inequitable, the Court may, for the purpose of determining the dischargeability of the debtor's income tax obligations, "add the time that the IRS was actually enjoined by the automatic stay in the prior bankruptcy case from proceeding against a debtor to the time period specified under § 507(a)(7)(A)(i). . . ." Id. at 314.

Having reviewed Judge Cohen's opinions and the cases finding the time periods in §§ 507 and 523 [*19] to be tolled during the pendency of a bankruptcy case, I find Judge Cohen's rulings more persuasive. Consequently, following the literal language of the Bankruptcy Code, only the Debtor's obligation for the 1986 tax year would be non-dischargeable. However, I find that such a result would unfairly prejudice the IRS.

The Debtor commenced his first bankruptcy to prevent Smith Barney from honoring the levy on the Debtor's IRA accounts. Had the Debtor not filed for bankruptcy on July 6, 1994, the IRS claims would have been paid in full. Once the Debtor filed his first petition, the automatic stay thereafter prevented the IRS from attempting to collect the delinquent taxes. The Debtor then dismissed his first petition and immediately filed another petition, attempting to discharge delinquent taxes not otherwise dischargeable in the first bankruptcy. If this Court holds that the time period for determining priority status and dischargeability of tax claims is not tolled during the Debtor's first bankruptcy case, the IRS will forever lose the ability to recover its taxes whereas the Debtor would effectively avoid payment on account of the first levy as well as discharge the underlying obligation, [*20] a result inconsistent with the purpose of the Bankruptcy Code. This Court will not allow the Debtor to use his first bankruptcy filing as both a sword and a shield.

Therefore, pursuant to the above, I find it necessary to

add to the 240-day reach back period the time that the IRS was enjoined, by reason of the automatic stay in the Debtor's first bankruptcy case, from pursuing its claim against the Debtor. Accordingly, based on the above calculations, the Debtor is only entitled to discharge the assessed and unpaid federal income tax liabilities for 1978, 1979 and 1987.

**Penalties Attributable to Tax Debt Arising More than Three Years from Date of Petition are Dischargeable**

Section 523(a)(7)(B) of the Bankruptcy Code provides that fines or penalties "imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition" are not discharged. In In re Burns, 887 F.2d 1541 (11th Cir. 1989), the Eleventh Circuit recognized that this section extends to tax penalties, even if the underlying tax is non-dischargeable.

In determining which tax penalties are dischargeable, it has been recognized that the relevant "transaction [*21] or event" the Court must look to is the date the tax was due. In re Leahey, 169 B.R. 96 (Bankr. D.N.J. 1994) (citing, Teeslink, 165 B.R. at 717). This is so because "penalties are incurred the first day that the tax payment or return is late." Leahey, 169 B.R. at 100. Accordingly, in this case, any penalties arising from the tax years prior to 1991 are discharged.[3]

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[3] The Debtor asserts that the penalties arising from all tax years before 1992 are discharged. However, the taxes for 1991 were not due until April 15, 1992. This is the transaction to which the Court must look, and it occurred within three years of the Debtor's petition.

**ORDER**

In accordance with the foregoing findings of fact and conclusions of law it is hereby ORDERED AND ADJUDGED as follows:

1. The relief requested in Count I of the Debtor's Complaint is hereby GRANTED. All liens for the delinquent taxes, penalties, and interest are avoided.

2. The relief requested in Count II of the Debtor's Complaint is GRANTED [*22] in part and DENIED in part. The Debtor's tax liability, along with interest and penalties assessed thereon, shall be discharged for the 1978, 1979, and 1987 tax years. The Debtor's tax liabilities for tax years 1983, 1984, 1985, and 1986 shall not be discharged.

3. The Debtor's liability for penalties arising from tax years prior to 1991 shall be discharged.

DONE AND ORDERED in chambers in the Southern District of Florida, this 26th day of January, 1996.

s/RAYMOND B. RAY, Judge
United States Bankruptcy Court

*[240 B.R. 636; 1999 U.S. Dist. LEXIS 4664; 99-1 U.S. Tax Cas. (CCH) P50,445; 84 A.F.T.R.2d (RIA) 5875]*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

JERALD D. SAUNDERS, Debtor,

_____/

JERALD D. SAUNDERS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

CASE NO. 96-6236-CIV-DIMITROULEAS
_____/

**FINAL ORDER AFFIRMING/REVERSING BANKRUPTCY COURT'S ORDER**

THIS CAUSE is before the Court, pursuant to 28 U.S.C. § 158(a), on cross-appeals by the debtor, Jerald D. Saunders, and the United States of America, of a Memorandum Decision and Order, dated January 26, 1996, entered by United States Bankruptcy Judge Raymond B. Ray (hereinafter "Bankruptcy Order").[4] The Court has carefully considered the cross-appeals, [**2] has carefully reviewed the court file herein

[4] Saunders v. United States (In re Saunders), 1996 Bankr. LEXIS 1928, No. 94-23489- BKR-RBR, 1995 WL 865471 (Bankr. S.D. Fla. Jan. 26, 1996).

including the entire designation of record on appeal, and is otherwise fully advised in the premises.

I. BACKGROUND

This case arose from the Internal Revenue Service's ("IRS") attempt to collect unpaid federal tax liabilities of the debtor, a former pilot with Pan Am. The debtor owed federal income taxes for the 1978, 1979, 1983, 1984, 1985, 1986 and 1987 tax years. In April 1991, Pan Am reassigned the debtor from Germany back to the United States. On September 20, 1991, the IRS filed a notice of federal tax lien in Washington, D.C. with respect to the unpaid tax liabilities. The IRS filed the notice in Washington, D.C. because it believed that the debtor still resided outside of the United States.

In late 1991, Pan Am filed for bankruptcy relief. As a result, the debtor lost his job with Pan Am. As an employee of Pan Am, the debtor had an interest [**3] in two pension plans. During the course of Pan Am's bankruptcy proceedings, the debtor's interests in those pension plans were terminated. Consequently, in March 1993, the debtor rolled over his funds from the pension plans into individual retirement accounts (IRA) held at Smith Barney Shearson, Inc. ("Smith Barney"). The IRS was seeking to levy on the IRA accounts in order to satisfy the debtor's outstanding tax liabilities. On June 9 or 10, 1994, the IRS mailed a notice of levy to Smith Barney, which was received on June 14, 1994. At all times before the levy, the funds in the IRA accounts totaled more than the outstanding tax liabilities. Pursuant to the notice of levy, Smith Barney believed the funds were to be released to the IRS by July 6, 1994.

On July 6, 1994, prior to Smith Barney releasing the funds to the IRS, the debtor filed a bankruptcy petition under Chapter 7 of the United States Bankruptcy Code in

order to prevent the IRS from levying upon his IRA accounts with Smith Barney. On August 26, 1994, realizing that certain liabilities were not dischargeable in the bankruptcy proceeding, the debtor requested the bankruptcy court to dismiss the petition. On September 8, 1994, [**4] at a hearing on the debtor's motion to dismiss, the bankruptcy court read a ruling into the record at approximately 11:00 a.m. dismissing the bankruptcy proceeding. A [*638] written order of dismissal followed, which was date-stamped by the Clerk's office at 2:01 p.m. and was docketed at 4:09 p.m. on the same day, September 8, 1994.

The IRS, after receiving the written order of dismissal, but prior to the docketing of the order, immediately filed a notice of federal tax lien in Broward County, Florida. The notice was date-stamped as filed at 2:32 p.m. on September 8, 1994.

On September 9, 1994, one day after the dismissal of his first bankruptcy proceeding, the debtor filed a second bankruptcy petition under Chapter 7 of the Bankruptcy Code. This second bankruptcy proceeding is currently before the Court. On September 9, 1994, the date of the present bankruptcy petition, the debtor owed the IRS over $ 500,000 as follows:

| Tax Year | Tax | Interest | Penalty |
|---|---|---|---|
| 1978 | $ 5,167.80 | $ 112,839.51 | $ 11,046.84 |
| 1979 | 6,616.64 | 24,689.14 | 1,995.16 |
| 1983 | 14,122.36 | 42,422.62 | 21,627.50 |
| 1984 | 14,427.00 | 39,769.82 | 22,213.84 |
| 1985 | 19,038.00 | 44,801.70 | 27,319.26 |
| 1986 | 19,349.00 | 24,166.31 | 9,190.78 |
| 1987 | 14,296.00 | 21,590.90 | 17,076.40 |

| | | | |
|---|---|---|---|
| Totals | $ 93,016.80 | $ 310,280.00 | $ 110,469.78 |

[**5] The debtor's IRA accounts with Smith Barney have been determined to be exempt from the debtor's bankruptcy estate pursuant to Florida Statutes §§ 222.21(2)(a) and 222.201.

On April 12, 1995, the debtor filed an adversary complaint to avoid liens and determine dischargeability of income taxes, which is the subject of the present cross-appeals. The adversary complaint sought to avoid the notices of federal tax liens recorded on September 20, 1991 in Washington, DC and on September 8, 1994 in Broward County, Florida. The adversary complaint also sought to have the debtor's 1978, 1979, 1983, 1984, 1985 and 1987 tax liabilities discharged.[5]

On September 22, 1995, a trial was held on the debtor's adversary complaint. Following the trial, [**6] the bankruptcy court entered its Memorandum Decision and Order, which is the current order on appeal. The bankruptcy court specifically held as follows: (1) the September 8, 1994 recording of a notice of federal tax lien violated the automatic stay provisions of 11 U.S.C. § 362, and is therefore avoided, because the IRS recorded the notice prior to the actual docketing of the written order of dismissal; (2) the September 20, 1991 notice of federal tax lien recorded in Washington, DC was ineffective, and therefore avoided, because the debtor was a resident of Florida; (3) the 1978, 1979 and 1987 taxes and interest are dischargeable but the 1983, 1984, 1985 and 1986 taxes and interest are not dischargeable; and (4) the penalties for all

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[5] The debtor has conceded from the beginning of the proceeding that the 1986 taxes and interest are dischargeable. The United States has not challenged the 1978, 1979, and 1987 tax liabilities, and the bankruptcy court discharged these liabilities in the Bankruptcy Order.

of the tax years at issue are dischargeable. The debtor appealed and the United States has cross-appealed.

Specifically, the debtor appeals the bankruptcy court's determination that the 1983, 1984 and 1985 taxes and interest are not dischargeable. The debtor asserts that the bankruptcy court should not have tolled the time periods for dischargeability for the time period during the debtor's first bankruptcy proceeding.

The United States appeals the [**7] bankruptcy court's determination that the debtor was a resident of Florida on September 20, 1991. The United States also appeals the bankruptcy court's determination that the recording of the September 8, 1994 notice of federal tax lien violated the automatic stay. Finally, the United States requests the Court to remand the matter to the bankruptcy court to determine the rights of the parties to the funds held in the IRA accounts with Smith Barney which are subject to the notice of levy.

The Court will address each of the issues on appeal in turn.

[*639] II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact will not be set aside unless clearly erroneous. Fed.R.Bankr.P. 8013; Green Tree Acceptance, Inc. v. Calvert (In re Calvert), 907 F.2d 1069, 1071 (11th Cir. 1990). Equitable determinations by the bankruptcy court are reviewed for abuse of discretion, In re Red Carpet Corp., 902 F.2d 883 (11th Cir. 1990), while conclusions of law are reviewed by the District Court *de novo*. In re Chase & Sanborn Corp., 904 F.2d 588 (11th Cir. 1990); In re Sublett, 895 F.2d 1381 (11th Cir. 1990).

## III. DISCUSSION

### A. Tolling of Time Periods for Prior Bankruptcy Filing [**8]

Pursuant to section 523(a)(1)(A) and 507(a)(8)(A)(ii) of the Bankruptcy Code, income tax liabilities which were assessed within 240 days, plus any time plus 30 days during which an offer in compromise was pending, of the date of the filing of the petition, are excepted from discharge. Here, the debtor's 1983, 1984 and 1985 taxes were assessed within such time period prior to the initial July 6, 1994 bankruptcy petition, and thus, were excepted from discharge.[6] Consequently, the debtor requested the bankruptcy court to dismiss the original bankruptcy proceeding to allow the debtor to file a new bankruptcy petition.

The debtor filed a new bankruptcy petition on September 9, 1994, which was filed more than 240 days (plus the additional time within which the debtor had an offer of compromise pending before the IRS plus 30 days) after the debtor's 1983, 1984 and [**9] 1985 taxes were assessed. Therefore, if the debtor had not filed the original bankruptcy proceeding, the debtor's 1983, 1984 and 1985 tax liabilities would have been dischargeable in the present bankruptcy proceeding.[7] The question before the Court, however, is whether the time period for

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[6] The parties do not dispute the dates that the IRS assessed the taxes or the time period during which the debtor had an offer in compromise pending.

[7] However, if the debtor had not filed the original bankruptcy petition, the IRS would have had ample opportunity to levy upon the debtor's IRA accounts with Smith Barney to satisfy the entire outstanding tax liabilities.

determining the dischargeability of tax liabilities was tolled during the pendency of the prior bankruptcy proceeding.

The Court notes that there is a split among the courts as to whether such time periods are tolled. Compare Waugh v. Internal Revenue Serv. (In re Waugh), 109 F.3d 489 (8th Cir.1997), cert. denied, 118 S. Ct. 80 (1997) (finding the time periods are suspended while the debtor was in bankruptcy) with Quenzer v. United States (In re Quenzer), 19 F.3d 163 (5th Cir.1993) (finding that [**10] the time periods are not suspended). The majority of cases, relying upon 11 U.S.C. § 108(c) and 26 U.S.C. 6503(b), hold that the time periods are suspended during the pendency of the debtor's prior bankruptcy proceedings and for an additional six months thereafter. See Simmons v. United States, 227 B.R. 338, 340 (Bankr. N.D. Ga. 1998) (listing cases). The Eleventh Circuit has not yet reached the present issue. For the reasons that follow, the Court will follow the majority of cases to decide the present issue.

While the Bankruptcy Code does not contain any provisions which explicitly suspend the dischargeability time periods while a debtor is engaged in bankruptcy proceedings, 11 U.S.C. § 108(c) provides as follows:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under [*640] section 1201 or 1301 of this title, and such period has not expired before the date of the filing of [**11] the petition, then such period does not expire until the later of--

> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108(c) (emphasis added). The United States' argument is that Section 108(c) incorporates 26 U.S.C. § 6503(h), which provides as follows:

> (h) Cases under title 11 of the United States Code.-- The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and--
>
> (1) for assessment, 60 days thereafter, and
>
> (2) for collection, 6 months thereafter.

(Emphasis added). In Waugh, the court addressed these two provisions and noted as follows:

> Waugh urges this Court to determine that because section [**12] 108(c) applies only to "nonbankruptcy law," the statute does not act to suspend the priority period of section 507(a)(8)(A)(i), which is itself part of the Bankruptcy Code. We recognize that "the plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at

> odds with the intentions of its drafters.'" United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S. Ct. 1026, 1031, 103 L. Ed. 2d 290 (1989)(alteration in original)(quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S. Ct. 3245, 3250, 73 L. Ed. 2d 973 (1982)); accord Missouri v. L.J. O'Neill Shoe Co. (In re L.J. O'Neill Shoe Co.), 64 F.3d 1146, 1150 (8th Cir.1995). However, we conclude that this is such a "rare case." If we applied the plain meaning of section 108(c) and held that the priority period of section 507(a)(8)(A)(i) is not suspended during bankruptcy proceedings, Congress's intent to afford the IRS a three-year priority period for the collection of taxes certainly would be frustrated. Therefore, we conclude that the three-year priority period of section 507(a)(8)(A)(i) is suspended [**13] by 11 U.S.C. § 108(c) and 26 U.S.C. § 6503(b) and (h), for the time that the automatic stay prevents the IRS from collecting outstanding tax debts.

Waugh, 109 F.3d at 492-493. In support of its decision, the court cited to the legislative history of section 108(c), which supports the position that Congress intended section 108(c) to incorporate section 6503(h) into the Bankruptcy Code:

> In the case of Federal tax liabilities, the Internal Revenue Code suspends the statute of limitations on a tax liability of a taxpayer from running while his assets are in the control or custody of a court and for 6 months thereafter (sec.6503(b) of the Code). The amendment applies this rule in a title 11 proceeding. Accordingly, the statute of limitations on collection of a nondischargeable Federal tax liability of a debtor will resume running after 6 months following the end of the period during which the debtor's assets are in the control or custody of the bankruptcy court. This rule will

> provide the Internal Revenue Service adequate time to collect nondischargeable taxes following the end of the title 11 proceedings.

Id. at 493 (quoting S.Rep. No. 95-989, at [**14] 31 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5816-17).

[*641] The court finds Waugh, and the other cases following the majority position, to be persuasive and will therefore follow the majority position. The Court notes that the present case would be the precise case that Congress was concerned about when it intended for the IRS to have adequate time to collect nondischargeable taxes following the end of a bankruptcy proceeding. Here, the original bankruptcy was dismissed on September 8, 1994 and the second bankruptcy was filed the next day on September 9, 1994. Clearly, the IRS did not have ample opportunity to collect the outstanding tax liabilities between the two bankruptcy proceedings, and the IRS' efforts to collect the debtor's liabilities were certainly frustrated by the debtor's successive bankruptcy filings. Accordingly, the Court affirms the bankruptcy court's holding that the debtor's 1983, 1984 and 1985 taxes and interest are excepted from discharge.[8][**15]

B. The September 20, 1991 notice was not effective

Pursuant to 26 U.S.C. § 6323(f)(2)(B), the proper place for filing a notice of federal tax lien, "in the case of personal property, whether tangible or intangible, [is] at the

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[8] Because of the Court's holding that the time periods were suspended by section 108(c) and 6503(h), the Court does not need to reach the bankruptcy court's basis, under 11 U.S.C. 105(c), for holding the 1983, 1984 and 1985 taxes and interest are nondischargeable.

residence of the taxpayer at the time the notice of lien is filed . . . and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia." In the present case, the bankruptcy court found that the debtor's residence at the time of the filing of the September 20, 1991 notice was Florida. Therefore, the bankruptcy court found that the notice was invalid. The United States argues that the notice was correctly filed in Washington, D.C. The Court disagrees.

"Section 6323(f)(2)(B) . . . was added by the Federal Tax Lien Act of 1966 (Pub.L.No.89-719) to clarify 'existing law by providing specific rules with respect to the place of filing a notice of a Federal tax lien....'" Corwin Consultants, Inc. v. Interpublic Group of Companies, Inc., 512 F.2d 605, 608 (2d Cir.1975) (quoting 3 U.S.Code Cong. & Admin.News, 89th Cong., 2d Sess.1966, at p. 3732 (S.Rep.No.1708)). "When the drafters added [**16] section 6323(f)(2)(B), they deliberately avoided using domicile, however, and chose residence instead 'because of the difficulty in determining a person's domicile, based as it is on (among other things) his state of mind.'" Id. (quoting 3 U.S.Code Cong. & Admin.News, supra, at p. 3732). A principal purpose of the 1966 Tax Lien Act in using "residence" filing was to "increase the likelihood that creditors, generally, will receive notice as to taxpayers' standing with the Government." Id. at 610 (quoting 3 U.S.Code Cong. & Admin.News, 89th Cong., 2d Sess.1966, at 3731); see also Urban Industries, Inc. of Kentucky v. Thevis, 670 F.2d 981 (11th Cir.1982). A person can have more than one residence but only one domicile. Urban Industries, 670 F.2d at 986 (citing Corwin, 512 F.2d 605 at 610).

The residence of a delinquent taxpayer is a question of fact to be determined by various criteria, including: the taxpayer's physical presence as an inhabitant and not a mere transient; the permanence of that presence; the

reason for his presence; and the existence of other residences. Corwin, 512 F.2d at 610; see also In re Carousel International Corp., 219 B.R. 807, 809 (C.D. [**17] Ill. 1997). In general, for this statute, where a taxpayer resides is where he dwells for a significant amount of time and where creditors would be most likely to look for him. Corwin, 512 F.2d at 610.

In the present case, the bankruptcy court found that the debtor was a Florida resident on September 20, 1991. In particular, the bankruptcy court found as follows:

> [*642] Upon review of the evidence, I find that the Debtor has been a resident of Florida since he was reassigned to Miami by Pan Am in April 1991. At that time, he was registered in a training course and filed a W-4 with his employer listing his Florida address. The Debtor has spent a great majority of his time traveling with Pan Am and "living out of a suitcase," but in 1991 the Debtor spent more than 100 days in Florida. . . . The IRS has not produced any evidence that the Debtor claimed any residency other than Florida after April 1991, or that Mr. Saunders spent more time anywhere other than Florida.

Bankruptcy Order at 4. The Court holds that the bankruptcy court's finding that the debtor was a Florida resident on September 20, 1991 was not clearly erroneous.[9] [**18]

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[9] The United States argues that the evidence was not sufficient to establish that the debtor was a residence of Florida. It is clear, however, that the debtor was no longer a resident of Germany, even if the IRS was unaware of this fact. Moreover, if the debtor was not a resident of Florida, then the only other alternative residence would have been New York. However, the IRS also did not file a notice of federal tax lien in New York. Finally, the Court agrees with

Having concluded that the debtor was a Florida resident on September 20, 1991, the next question presented is whether the IRS can still file the notice in Washington, D.C. if the only means available to the IRS indicates that the debtor still resided outside the United States. More specifically, the question is whether the debtor was required to notify the IRS that he had changed his residence to Florida. The Court finds that the Internal Revenue Code does not provide for such a requirement.

The cases relied upon by the United States all involve instances where the IRS mailed notices of deficiencies of taxes to taxpayers under 26 U.S.C. § 6212. Section 6212 requires that a notice of deficiency be mailed to the taxpayer's "last known address." Implicit in this requirement is that the taxpayer must notify the IRS of any new address or the IRS is permitted to mail a notice of deficiency to the taxpayer's last known address, even if the taxpayer no longer lives there. See, e.g., Gaw v. Commissioner, 310 U.S. App. D.C. 160, 45 F.3d 461 (D.C. Cir. 1995). Unlike section 6212, however, section 6523(f)(2)(B) does not provide that the IRS may file a notice of federal tax lien in the taxpayer's [**19] "[last known] residence." The Court declines to read such additional language into the statute. But see Corwin, 512 F.2d 605 at 611 (concurring opinion) ("The interpretation of "residence" as meaning "last known residence" is in accord with other provisions of the Code, see, e.g., 26 U.S.C. §§ 6212 & 6303."). Rather, the notice of federal tax

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the United States' argument that events occurring after September 20, 1991 are not relevant for determining the debtor's residence on September 20, 1991. However, ignoring these additional events, the Court holds that the bankruptcy court's finding that the debtor was a Florida resident on September 20, 1991 was not clearly erroneous.

lien must be filed in the taxpayer's residence.

Here, the debtor's residence on September 20, 1991 was in Florida. While the Court is sympathetic to the United States' argument that it would have been difficult to ascertain the debtor's residence in September 1991, it would have been just as difficult for creditors, especially creditors in Florida, to have located a notice of federal tax lien filed in Washington, D.C. Therefore, the Court affirms the bankruptcy court's holding that the September 20, 1991 notice of federal tax lien filed in Washington, D.C. was not valid.

C. The September 8, 1994 notice was valid and not avoidable.

The next question presented is whether the automatic stay from the debtor's prior bankruptcy was lifted prior to 2:32 p.m., on September 8, 1994, when the IRS filed its notice of federal tax lien in Broward County, [**20] Florida. 11 U.S.C. § 362(c)(2) provides that the automatic [*643] stay was in effect until the prior bankruptcy case was "dismissed." Therefore, the Court must decide when the prior bankruptcy case was actually "dismissed" for purposes of dissolving the automatic stay.

The United States argues that the notice of federal tax lien did not violate the automatic stay if the bankruptcy case was dismissed by the bankruptcy court when the court gave its ruling from the bench, or when the bankruptcy court signed its order dismissing the action, or when the written order was stamped by the clerk of the court. The debtor argues that the case was not dismissed until the clerk officially docketed the written order at 4:09 p.m. on the computer system, and therefore, the recording of the notice of federal tax lien at 2:32 p.m. violated the automatic stay.

After considering the arguments of the parties, the bankruptcy court held that the notice of federal tax lien filed on September 8, 1994 violated the automatic stay provisions of section 362 as follows:

> Federal Rule of Bankruptcy Procedure 9021 provides that "[a] judgment is effective when entered as provided in Rule 5003." Rule 5003 requires [**21] the Clerk to enter on the official docket "each judgment, order, and activity in that case." The term "judgment" as used in this rule means "any appealable order". F.R.B.P. 9001(7). Therefore, any appealable order becomes effective once entered on the Court's official docket.
>
> The Dismissal Order is an appealable final order. Consequently, following the plain meaning of the above rules, the notice of federal tax lien, which was filed prior to the actual docketing of the Dismissal Orders, was filed when the automatic stay was still in effect. See, In re Weston, 101 B.R. 202 (Bankr. E.D. Cal. 1989) (automatic stay terminated when dismissal order entered on docket), aff'd, 123 B.R. 466 (9th Cir. BAP 1991). See also, In re Beatty, 162 B.R. 853 (9th Cir. BAP 1994) (effective and operative date of order is date of entry into docket); In re Rebeor, 89 B.R. 314 (Bankr. N.D.N.Y. 1988) (oral ruling converting case was not effective until entered on docket by clerk).

Bankruptcy Order at 6.

Initially, the Court has reviewed the cases cited by the bankruptcy court and notes that none of these cases squarely addressed the subject issue in the present action. At best, the [**22] cited passages in these cases are merely dicta. However, for every case that states that an order must be officially docketed to be effective, the

Court has also found a separate case indicating that a dismissal is effective when dismissed on the record or when the order was entered. See, e.g., In re Lashley, 825 F.2d 362, 363 (11th Cir.1987) (per curiam) ("On September 22, 1986, the bankruptcy court entered an order dismissing the case. The bankruptcy court also specifically dissolved and vacated the § 362(a) automatic stay."); see also Fish Market Nominee Corp. v. Pelofsky, 72 F.3d 4, 6 (1st Cir.1995) ("But the stay under section 362(a) itself expired as soon as the judgment dismissing the chapter 11 case was entered, § 11 U.S.C. 362(c)"); In re De Jesus Saez, 721 F.2d 848, 851 (1st Cir.1983) ("We begin by noting that, unless extended by Rule 762 or in some other manner, an automatic stay must plainly terminate upon dismissal of the petition giving rise to it."). However, these additional cases also did not squarely address the subject issue in the present action. As far as the court can ascertain, the present issue is an issue of first impression.

More importantly, [**23] a review of the applicable rules also does not support the bankruptcy court's holding. Rule 5003 provides in pertinent part as follows:

> (a) Bankruptcy dockets. The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case as prescribed by the Director of the Administrative Office of [*644] the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made.

The Court notes that Rule 5003 is unclear as to which "entry" is required to be shown on the docket. Docket sheets routinely reflect both the date the order was actually entered by the Judge and the date the order was docketed. Of course the effective date listed on the

docket sheet is always the actual date of the Order (or the date a pleading was actually filed) and not the actual date of docketing, which many times occurs a day or several days later.

Regardless of which entry is referenced, however, it does not necessarily follow from these rules that it is the task of docketing the order that makes the order effective. Rather, common sense dictates that a court's order is effective when a court enters such an [**24] order. If a court orders a case dismissed, then the case is dismissed. To hold otherwise would permit the clerk's office to misplace an order and prevent the judge's order from becoming effective. Parties should be able to reasonably rely on a written order, signed by a Judge, that the party has actually received, even if this Order does not get docketed. This is exactly what occurred here. The IRS physically had in its revenue officer's hands, a signed order from the bankruptcy court with a date stamp of 2:01 p.m., September 8, 1994. Relying upon this signed order, which caused the automatic stay to no longer be in effect, the IRS immediately filed a notice of federal tax lien. The Court holds that the filing of this notice of federal of tax lien did not violate the automatic stay.

Therefore, the Court holds that the prior bankruptcy case was dismissed when the bankruptcy court entered its order dismissing the case.[10] This dismissal occurred

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[10] The Court does not need to reach the question whether the bankruptcy court's oral dismissal operated to cease the automatic stay, because a written order was also entered and date-stamped prior to the IRS' filing of the subject notice of federal tax lien. Compare In re Tim Wargo & Sons, Inc., 107 B.R. 622, 625 (Bankr. E.D. Ark.1989) and In re Rebeor, 89 B.R. 314, 320 (Bankr. N.D.N.Y. 1988), which found that a court's oral ruling is not operative if it is a final order, with In re Nail, 195 B.R. 922 (Bankr. N.D. Ala.1996), which disagreed

prior to 2:32 p.m. on September 8, 1994, and consequently, the automatic stay was no longer in effect when the IRS filed its notice of federal tax lien. Accordingly, the Court reverses the bankruptcy court's holding that the September 8, 1994 [**25] notice of federal tax lien violated the automatic stay.

D. Determination of the Rights of the Parties

The United States argues that the bankruptcy court failed to address the rights of the parties with respect to the IRA accounts at Smith Barney. The debtor agrees that the Bankruptcy Order does not address this issue; however, the debtor argues that the issue was not preserved in the pretrial order and the issue was not raised by the [**26] United States in its pleadings. Because the bankruptcy court has not addressed the issue, including whether the issue was even preserved for the bankruptcy court to address, and in light of the court's prior rulings which clearly affect the parties rights to the IRA accounts with Smith Barney, the Court will remand the matter to the bankruptcy court to address.

IV. CONCLUSION

Accordingly, after due consideration, it is

**ORDERED AND ADJUDGED** as follows:

1. The Bankruptcy Court's Memorandum Decision and Order, dated January 26, 1996, is hereby **AFFIRMED** in part and **REVERSED** in part as follows:

> A. The bankruptcy court's holding that the debtor's 1983, 1984 and 1985 taxes and interest are excepted

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with the prior cases.

from discharge is hereby **AFFIRMED**;

[*645] B. The bankruptcy court's holding that the September 20, 1991 notice of federal tax lien filed in Washington, D.C. was not valid is hereby **AFFIRMED**;

C. The bankruptcy court's holding that the September 8, 1994 notice of federal tax lien violated the automatic stay is hereby **REVERSED**; and

2. This case is **REMANDED** to the Bankruptcy Court to enter whatever orders are necessary consistent with the above rulings, [**27] including addressing the rights of the parties with respect to the IRA accounts at Smith Barney;

3. The Clerk of this Court is directed to deny all pending motions as moot; and

4. This case is closed.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida, this 25th day of February, 1999.

s/WILLIAM P. DIMITROULEAS
United States District Judge

(DO NOT PUBLISH)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 00-12737

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D. C. Docket Nos. 96-06236-CV-WPD
94-23489-BKC-RB

JERALD D. SAUNDERS,

Plaintiff-Appellant,

versus

MARIKA TOLZ,
UNITED STATES OF AMERICA,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Florida

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(October 4, 2001)

Before [ROSEMARY] BARKETT and [STANLEY] MARCUS, Circuit Judges, and O'KELLEY*, District Judge.

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*The Honorable William C. O'Kelley, U.S. District Court Judge for the Northern District of Georgia, sitting by designation.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1. [1]

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1 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record.

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Supreme Court, U.S.
FILED
FEB 15 2002
CLERK

(3)

No. 01-1051

# In the Supreme Court of the United States

JERALD D. SAUNDERS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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1308

## QUESTION PRESENTED

Whether the filing of a notice of federal tax lien after an order dismissing petitioner's bankruptcy petition had been signed by the Bankruptcy Court judge and was in the clerk's office awaiting entry, but one hour and 37 minutes before the clerk performed the ministerial act of entering the judge's order, violated the automatic stay of Section 362 of the Bankruptcy Code, 11 U.S.C. 362.

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# In the Supreme Court of the United States

No. 01-1051

JERALD D. SAUNDERS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet App. 36-37) is reported at 275 F.3d 51. The opinion of the district court (Pet. App. 17-35) is reported at 240 B.R. 636. The opinion of the bankruptcy court (Pet. App. 1-16) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 4, 2001. The petition for a writ of certiorari was timely filed on January 17, 2002, having been timely postmarked on January 2, 2002 (28 U.S.C. 2101(c); Sup. Ct. R. 29). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner, who is a former pilot with Pan Am Airways, owed federal incomes taxes and penalties for his 1978, 1979, 1983, 1984, 1985, 1986, and 1987 taxable years in the total amount of $513,766.58. Pet. App. 18-19. In April 1991, Pan Am reassigned petitioner from Germany to the United States. On September 20, 1991, believing that petitioner still resided outside the United States, the Internal Revenue Service filed a notice of federal tax lien in Washington, D.C., with respect to petitioner's unpaid federal tax liabilities. *Id.* at 3, 18.[1]

In late 1991, Pan Am filed for bankruptcy. As a result, petitioner lost his job with Pan Am, and his interests in Pan Am's pension plans were terminated. In March 1993, petitioner rolled over funds received from the pension plans into individual requirement accounts (IRAs) held at Smith Barney Shearson, Inc.[2] Pet. App. 2.

In June 1993, the Internal Revenue Service issued a notice of levy to Smith Barney to collect the taxes that petitioner owed. Pet. App. 18. On July 6, 1994, before Smith Barney released the funds in petitioner's IRA, petitioner filed a bankruptcy petition under Chapter 7 of the Bankruptcy Code to forestall collection of his tax liabilities. *Id.* at 18-19. Petitioner subsequently determined, however, that taxes for some years would be dischargeable only if his bankruptcy petition were filed

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[1] See 26 U.S.C. 6323(f)(2) (in determining the proper place to file a notice of tax lien for personal property, a taxpayer "whose residence is without the United States shall be deemed to be in the District of Columbia").

[2] Petitioner's IRA accounts with Smith Barney were later determined to be exempt from claims of all creditors other than the IRS. Pet. App. 20.

on or after September 9, 1994. Petitioner moved to dismiss his bankruptcy petition, which would allow him to refile the petition on or after September 9, 1994, and seek a discharge of additional taxes. *Id.* at 5. The bankruptcy court granted petitioner's motion to dismiss his bankruptcy case and read the ruling authorizing dismissal into the record. *Id.* at 5, 19. The order of dismissal was signed by the bankruptcy court judge and date stamped by the clerk's office of the bankruptcy court at 2:01 p.m. on September 8, 1994. The order was thereafter docketed by the clerk's office at 4:09 p.m. the same day. *Id.* at 19.

At 2:32 p.m. on September 8, 1994—after the signed order of dismissal was in the possession of the clerk of the bankruptcy court but before that order was entered on the clerk's docket—the Internal Revenue Service filed a new notice of tax lien in Broward County, Florida, where petitioner then resided. Petitioner filed a new bankruptcy petition on the following day, September 9, 1994, at 10:53 a.m. Pet. App. 19.

2. On April 12, 1995, petitioner filed an adversary complaint in his bankruptcy case to avoid the government's tax liens and to determine the dischargeability of his income tax liabilities. Pet. App. 20. After a trial, the bankruptcy court held that taxes for the years 1978, 1979, and 1987, and penalties for all years, were dischargeable. The bankruptcy court held further, however, that the time periods that determine dischargeability (11 U.S.C. 507(a)(8)(A)(ii)) are tolled during the period that the government was prevented from collecting taxes due to petitioner's prior bankruptcy filing. As a result, the bankruptcy court held that taxes for the years 1983, 1984, and 1985 were not dischargeable. Pet. App. 10-15. In addition, petitioner did not contest that taxes for his 1986 taxable year were

not dischargeable, and the bankruptcy court so held. *Id.* at 3, 11.

The bankruptcy court further held that the notice of federal tax lien recorded in Washington, D.C., was ineffective because, at the time the notice of tax lien was filed, petitioner was a resident of Florida. Pet. App. 3-4, 8-10. In addition, the bankruptcy court held that the notice of tax lien filed by the goverment on September 8, 1994, violated the automatic stay and was therefore ineffective. *Id.* at 6-8. In so holding, the bankruptcy court stated that, although the automatic stay terminates when a bankruptcy case is dismissed, an order of dismissal is not effective until it is entered. The court reasoned that, since the government filed its notice of tax lien before the order dismissing petitioner's case was entered on the clerk's docket sheet, the notice of tax lien violated the automatic stay and was void. *Ibid.*

3. Both parties appealed to the district court. The district court affirmed most of the bankruptcy court's holdings but reversed that court's holding that the September 8, 1994, notice of federal tax lien violated the automatic stay. Pet. App. 17-35. The court concluded that entry of the order of dismissal on the clerk's docket sheet was a ministerial act that was not essential for the order to be effective. The court held that, for the purpose of determining when the automatic stay expired, the case was "dismissed" (11 U.S.C. 362(c)(2)(B)) when the court signed an order directing that it be dismissed. Pet. App. at 33. The court emphasized that, "[t]o hold otherwise would permit the clerk's office to misplace an order and prevent the judge's order from becoming effective." *Ibid.* The court therefore held that the notice of tax lien filed by

the government at 2:32 p.m. on September 8, 1994, did not violate the automatic stay. *Id.* at 30-34.

4. The district court remanded the case for the Bankruptcy Court to resolve an additional issue concerning the rights of the parties with respect to the IRA accounts. Pet. App. 35. After resolution of that issue and entry of a decision by the district court on appeal reaffirming its holdings in the case, petitioner appealed. The court of appeals then affirmed per curiam, without writing an opinion. *Id.* at 36-37.

## ARGUMENT

Petitioner's case involves a unique factual circumstance, in which a notice of federal tax lien was filed after a bankruptcy case was ordered to be dismissed by the bankruptcy court but before that signed order was entered on the clerk's docket sheet. The court of appeals correctly concluded that the filing of a notice of tax lien does not violate an automatic stay in a bankruptcy case that has been ordered to be dismissed by the bankruptcy court. That determination does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. Section 362(a) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay" against various steps of creditors to obtain collection of the debts owed to them. 11 U.S.C. 362(a). That automatic stay continues in effect until the earliest of "the time the case is closed," "the time the case is dismissed," or "the time a discharge is granted or denied." 11 U.S.C. 362(c)(2)(A)-(C). See *In re Income Property Builders, Inc.*, 699 F.2d 963, 965 (9th Cir. 1982) ("[a]fter an order of dismissal, the debtor's debts and property are subject to the general laws, unaffected by bank-

ruptcy concepts"). The dismissal of a bankruptcy petition "puts all parties back in the same position they were prior to the filing of the bankruptcy petition. It is as if no bankruptcy petition had ever been filed." *In re Stahley*, 90-1 U.S. Tax Cas. (CCH) ¶ 50,247 (Bankr. D. Colo. 1990).

b. In asserting that his case had not formally been dismissed at the time that the government filed its notice of tax lien, petitioner relies (Pet. 13) on Rule 58(a) of the Federal Rules of Civil Procedure. That Rule specifies that "[a] judgment is effective only when so set forth [in a separate document] and when entered * * * ." Fed. R. Civ. P. 58(a). This case, however, arose in bankruptcy court. Rule 9021 of the Bankruptcy Rules makes Rule 58 of the Federal Rules of Civil Procedure applicable to bankruptcy cases only "[e]xcept as otherwise provided" in that Rule. Fed. R. Bankr. P. 9021. Rule 9021 then specifies that a judgment in bankruptcy court "is effective when entered;" unlike Rule 58, it does not state that a judgment is effective "only" when entered. The question presented in this case is thus governed by the distinct language of the Bankruptcy Rules, not by the text of Rule 58 of the Federal Rules of Civil Procedure.

In contexts apart from Rule 58, courts have frequently given effect to judgments prior to their formal entry. For example, under Rule 4(a) of the Federal Rules of Appellate Procedure, a notice of appeal may be filed from a final order after announcement of judgment but prior to its entry. Indeed, this same conclusion had been reached even before Rule 4(a) had been amended specifically to provide for that result. Fed. R. App. P. 4(a), Advisory Committee Notes (1979 amendment) ("Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held pre-

mature appeals effective."); *Markham* v. *Holt*, 369 F.2d 940, 941-942 (5th Cir. 1966); *In re Grand Jury Impaneled Jan. 21, 1975*, 541 F.2d 373, 376-377 (3d Cir. 1976); see also *United States* v. *Interlink Systems, Inc.*, 984 F.2d 79, 82 (2d Cir. 1993) ("a party can appeal an order that has not been entered as a judgment if no further proceedings are contemplated"); *Eberhardt* v. *O'Malley*, 17 F.3d 1023 (7th Cir. 1994).

And, courts have frequently noted that "[a] judgment duly rendered is binding and enforceable between the parties although, due to neglect of the clerk, no formal entry has been made thereof." *Continental Oil Co.* v. *Mulich*, 70 F.2d 521, 524 (10th Cir. 1934). See *Zadig* v. *Aetna Ins. Co.*, 42 F.2d 142 (2d Cir. 1930); *United States* v. *Hunt*, 513 F.2d 129, 137 (10th Cir. 1975). That is because the "[r]endition of judgment" itself constitutes the "judicial act" and the "filing and entry" of a judgment are merely "ministerial activities * * * handled by the clerk." *Weedon* v. *Gaden*, 419 F.2d 303, 306 (D.C. Cir. 1969); *Rexnord Holdings, Inc.* v. *Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994); *In re Capgro Leasing Associates*, 169 B.R. 305 (Bankr. E.D. N.Y. 1994). Applying this principle, courts have concluded that even an oral order lifting an automatic stay has "binding effect [on the parties] * * * notwithstanding the issuing court's failure to enter it on the docket." *Noli* v. *Commissioner*, 860 F.2d 1521, 1525 (9th Cir. 1988).

c. The purposes of the automatic stay are to grant debtors a breathing spell and protect against premature disbursements from the estate. *Carver* v. *Carver*, 954 F.2d 1573, 1576 (11th Cir.), cert. denied, 506 U.S. 986 (1992); *Hunt* v. *Bankers Trust Co.*, 799 F.2d 1060, 1069 (5th Cir. 1986). It is obvious that those interests would not be advanced by extending the

automatic stay *after* the court has signed an order that grants the debtor's own voluntary motion to dismiss the bankruptcy case.

2. Petitioner errs in asserting (Pet. 10, 15-16) that the decision in this case conflicts with the decision of the Fifth Circuit in *In re American Precision Vibrator Co.*, 863 F.2d 428 (1989), and with the decision of the Second Circuit in *In re Barbieri*, 199 F.3d 616 (1999). Those courts determined the date on which a final judgment was entered in a bankruptcy case for the purpose of determining whether the bankruptcy court had lost jurisdiction to enter a separate order in the case. *In re American Precision Vibrator Co.*, 863 F.2d at 429; *In re Barbieri*, 199 F.3d at 622 (bankruptcy court had jurisdiction to dismiss a Chapter 13 case when the motion to dismiss was filed before entry of order converting the case from Chapter 13 case to Chapter 7 case).[3] See also *Beatty* v. *Traub*, 162 B.R. 853 (BAP 9th Cir. 1994) (debtor possessed right to dismiss Chapter 13 case when order converting case to Chapter 7 case had not yet been entered); *Coones* v. *Mut. Life Ins. Co. of New York*, 168 B.R. 247, 258 (D. Wyo. 1994) (bankruptcy court that had "determined that dismissal of the entire case was appropriate" but had not entered order of dismissal possessed jurisdiction to entertain a motion to modify the automatic stay).

By contrast, the present case concerns the different question whether the automatic stay continued in effect even after an order of dismissal was signed by the

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[3] Petitioner's reliance (Pet. 18-19) on *Mining Co.* v. *Anglo-Californian Bank.*, 104 U.S. 192 (1881), is also misplaced. That case involved the effect of a judgment rendered by a state trial court "for the city and county of San Francisco." *Id.* at 193. Nineteenth century rules of local practice have no bearing on the resolution of the question presented in this case.

bankruptcy court, at the debtor's request, and delivered by the bankruptcy court to the clerk for docketing. The Bankruptcy Code specifies that the automatic stay expires when "the case is dismissed." 11 U.S.C. 362(c)(2)(B). As the district court emphasized, in applying the automatic stay statute, "common sense dictates that a court's order is effective when a court enters such an order," and the "[p]arties should be able to reasonably rely on a written order, signed by a Judge, that the party has actually received * * * ." Pet. App. 33. In the present case, the bankruptcy court had not only signed a written order but the "ruling authorizing dismissal of the case was read into the record at the time of the hearing." *Id.* at 5.

There is no conflict among the circuits on the application of this specific statutory language to the unique facts of this case. Further review is therefore not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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